SUPREME COURT, U. S.

Supreme Court, U.S.
FILED
NOV 26 1971
E. ROBERT SEAVER, CLE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-447

ALLEGHENY AIRLINES, INC.,
Petitioner,

v.

LEE LEMAY, as Administrator of the Estate of Robert W. Carey, deceased,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

FLOYD W. BURNS
RICHARD R. McDOWELL
800 Union Federal Building
Indianapolis, Indiana 46204
Attorneys for Respondent

CADICK, BURNS, DUCK & NEIGHBOURS
800 Union Federal Building
Indianapolis, Indiana 46204
Of Counsel

C. E. Pauley & Co., Inc., Indianapolis

TABLE OF CONTENTS

PAGE

Question Presented 1

Statutes Involved 2

Statement of the Case 2

Argument 4

1. The appealability of a judgment dismissing a third-party complaint in an action involving multiple claims and multiple parties depends upon an express discretionary determination by the District Court that there is no just reason for delay and upon an express direction for the entry of judgment 4

2. The decision of the Court of Appeals for the Seventh Circuit dismissing the appeal is not in conflict with the decision of any other Court of Appeals or any decision of the Judicial Panel on Multidistrict Litigation 9

3. The Multidistrict Litigation Act does not enlarge the jurisdiction of the District Court or the Court of Appeals 10

Conclusion 15

CITATIONS

CASES — PAGE

Cobbledick v. United States, 309 U.S. 323 (1940) 5
Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 (1949) 7
Coulter v. Sears Roebuck and Co., 411 F.2d 1189 (5th Cir. 1969) 10
Courembis v. Independence Avenue Drug Fair, Inc., 316 F.2d 658 (D. C. Cir. 1963) 10
DiBella v. United States, 369 U.S. 121 (1962) 5
Dickinson v. Petroleum Conversion Corp., 338 U.S. 507 (1950) 5
In re Mid-Air Collision Near Fairland, Indiana, 300 F. Supp. 621 (JPML 1970) 3, 13
Luckenbach Steamship Co. v. H. Muehlstein & Co., 280 F.2d 755 (2d Cir. 1960) 10
Panichella v. Pennsylvania R. R. Co., 252 F.2d 452 (3d Cir. 1958) 8
Peralta v. Quad Tool and Dye Supply Co., 370 F.2d 103 (3d Cir. 1966) 10
Sears, Roebuck & Co. v. Mackey, 351 U.S. 427 (1956) 5, 6, 8
Weinstock Hermanos & Cia Ltda. v. American Aniline & E. Co., 406 F.2d 1327 (3d Cir. 1969) 10

STATUTES

28 U.S.C. § 1291 ..... 4, 5, 6
28 U.S.C. § 1292(b) 3, 6, 9, 11, 14
28 U.S.C. § 1404 ..... 12, 13
28 U.S.C. § 1406 ..... 12, 13
28 U.S.C. § 1407 (Multidistrict Litigation Act) 3, 8, 9, 11, 12, 13, 14
Federal Rules of Civil Procedure—54(b) 1-14
1968 U.S. Code Cong. and Adm. News 11

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-447

ALLEGHENY AIRLINES, INC.,
Petitioner,

v.

LEE LEMAY, as Administrator of the Estate of Robert W. Carey, deceased,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Question Presented

Whether the Court of Appeals has jurisdiction of an appeal from the decision of a District Court dismissing a third-party complaint in an action involving multiple claims and multiple parties when the District Court expressly refused to make a determination that there is no just reason for delay and to direct the entry of a final judgment under Rule 54(b) of the Federal Rules of Civil Procedure.

Statutes Involved

The statutory provisions involved are printed in Appendix A of the Petition. For convenience, Rule 54(b) of the Federal Rules of Civil Procedure is set forth below:

> **Rule 54. Judgments; Costs**
>
> **(b) Judgment upon Multiple Claims or Involving Multiple Parties.** When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

Statement of the Case

On September 9, 1969 an Allegheny Airlines DC-9 jet aircraft and a Piper Cherokee aircraft being flown by Robert W. Carey, a student pilot, collided in mid-air and crashed to the ground near Fairland, Indiana. The eighty-two occupants of the DC-9 and Robert Carey, the sole occupant of the Piper Cherokee, were all killed in the accident. At the time of his death, Robert Carey was a citizen and resident of the State of Indiana. Respondent Lee LeMay was subsequently appointed as the Adminis-

trator of Robert Carey's estate by the Probate Court of Marion County, Indiana.

A number of wrongful death actions arising out of the accident are now pending in the United States District Court for the Southern District of Indiana, Indianapolis Division. Some of these actions were commenced in Indiana and others, which include those involved in Allegheny's petition, were commenced in several different states and transferred to the District Court in Indiana for coordinated or consolidated pretrial proceedings pursuant to 28 U.S.C. § 1407 by order of the Judicial Panel on Multidistrict Litigation. *In re Mid-Air Collision Near Fairland, Indiana,* 309 F. Supp. 621 (JPML 1970).

After the twenty-six cases involved in Allegheny's petition were transferred to Indiana, Allegheny, who already had been named as a defendant in those cases, caused a summons and third-party complaint seeking indemnity and contribution to be served upon respondent LeMay, who was not then a party to these particular actions. LeMay was a citizen and resident of the State of Indiana and was not subject to suit in any of the transferor forums involved.

LeMay promptly filed motions to dismiss the third-party complaints. On November 18, 1970, the District Court sustained LeMay's motions and dismissed Allegheny's third-party complaints without prejudice. (Pet. p. 25). By a separate entry on the same date, the District Court expressly denied Allegheny's request for the requisite findings and entry of partial final judgment under Rule 54(b) of the Federal Rules of Civil Procedure and also denied Allegheny's alternative request for certification of the question for immediate appeal under 28 U.S.C. § 1292(b). (Pet. p. 33)

Allegheny then filed timely notices of appeal in the District Court. Subsequently, the United States Court of Appeals for the Seventh Circuit ordered that the twenty-six cases be consolidated for the purposes of appeal. Respondent LeMay, thereafter, filed a motion to dismiss the appeal on the ground that the decision of the District Court was not a final or appealable decision within the jurisdiction of the Court of Appeals under 28 U.S.C. § 1291. Initially, the Court of Appeals denied LeMay's motion to dismiss the appeal without prejudice to the parties' rights to raise the same issues in their briefs and on oral argument. However, the Court of Appeals later entered an order that on its own motion it had taken the motion to dismiss under advisement by way of reconsideration and ordered that no briefs be filed.

On July 2, 1971, the United States Court of Appeals for the Seventh Circuit in a per curiam opinion granted LeMay's motion and dismissed the consolidated appeals. (Pet. p. 36) The Court of Appeals held that it did not have jurisdiction under 28 U.S.C. § 1291 because the entry of the District Court was not a final judgment without the discretionary findings required by Rule 54(b).

Argument

1. The appealability of a judgment dismissing a third-party complaint in an action involving multiple claims and multiple parties depends upon an express discretionary determination by the District Court that there is no just reason for delay and upon an express direction for the entry of judgment.

The question presented in Allegheny's petition is not unique. The requirement of finality as a condition for appellate jurisdiction is an historic characteristic of federal

procedure. *Cobbledick* v. *United States,* 309 U.S. 323 (1940); *DiBella* v. *United States,* 369 U.S. 121 (1962). This principle is embodied in 28 U.S.C. § 1291, which gives Courts of Appeal jurisdiction of appeals from ". . . all final decisions of the district courts of the United States. . . ." This statute and the foregoing decisions of this Court indicate that the fundamental policy against piecemeal appeals has more than mere technical significance. The final judgment rule is required to prevent the inundation of appellate courts with appeals from interlocutory orders and the consequent disruption of orderly trial procedure.

In some instances the degree of finality which permits an appeal is difficult to ascertain. Liberalization of federal practice to allow the joinder of claims, counterclaims, cross-claims, and third-party claims in one law suit, along with multiple parties, has complicated the decision which must be made by a litigant concerning the appealability of a judgment resolving less than all of the claims in a multiple claims action. However, Rule 54(b) of the Federal Rules of Civil Procedure was promulgated to obviate this problem and to provide the necessary certainty for the timing of an appeal in such cases. *Sears, Roebuck & Co.* v. *Mackey,* 351 U.S. 427 (1956); *Dickinson* v. *Petroleum Conversion Corp.* 338 U.S. 507 (1950).

In a case involving multiple claims or multiple parties, the District Court is permitted under Rule 54(b) to direct the entry of final judgment as to one or more but fewer than all of the claims or parties. However, it may do so "only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment." As this Court stated in *Sears,* the District Court is used as a dispatcher and is permitted

to determine the appropriate time when its decision upon one or more but less than all of the claims is ready for appeal. 351 U.S. at 435. The party adversely affected by the District Court's decision therefore knows with certainty that the time for appeal will not begin to run until the certification has been made.

Rule 54(b) is directly applicable to the twenty-six cases involved in this petition. Each case involves multiple claims and multiple parties. The dismissal of petitioner's third-party complaints by the District Court adjudicated "fewer than all the claims or the rights and liabilities of fewer than all the parties" involved in each case. Moreover, despite petitioner's specific request, the District Court expressly refused to make the determination and direction required under Rule 54(b) for entry of final judgment and also expressly refused to certify the question for immediate appeal under 28 U.S.C. § 1292(b). (Pet. p.33) In the absence of such a finding by the District Court, Rule 54(b) provides that the decision will remain "subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties." By refusing to make the requisite Rule 54(b) findings and to direct the entry of final judgment, the District Court has retained the power to revise its decision dismissing petitioner's third-party claims at any time. It alone is in a position to determine whether it is, or is not, through with a portion of the litigation. The District Court is obviously qualified to exercise such discretion because of its intimate contact with the course of the litigation. Accordingly, the District Court's decision can not be considered final and the Court of Appeals correctly determined that it lacked jurisdiction of the appeal under 28 U.S.C. § 1291.

Petitioner seeks to avoid Rule 54(b), arguing that the Court of Appeals has jurisdiction under this Court's decision in *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949), which permitted an appeal from a collateral order of the District Court requiring plaintiff to post a cash bond before bringing a stockholder's derivative action. The Court noted that the order "did not make any step toward final disposition of the merits of the case and will not be merged in final judgment." 337 U.S. at 546. Such a collateral order by the District Court in *Cohen* was not the adjudication of a claim for relief as referred to in Rule 54(b). To the contrary, the *Cohen* rule applies to orders "separable from, and collateral to, rights asserted in the action." 337 U.S. at 546. This distinction was recognized by the Court of Appeals when it stated that "the word 'collateral' has more than a passing significance." (Pet. p.44) It felt that interlocutory orders should be subject to Rule 54(b) with the exception of truly collateral orders. An order of the District Court dismissing a claim for relief, such as a third-party complaint, can hardly be considered "collateral" in the sense that term was used in *Cohen.*

After pretrial proceedings are completed, the Judicial Panel on Multidistrict Litigation will remand the instant cases to their respective transferor courts for trial. The main thrust of petitioner's argument is that it may suffer undue hardship because in the event any verdicts are rendered against it in the various transferor courts it might have to appeal the order dismissing its third-party claims to several different Courts of Appeal. Such a possibility should not affect the jurisdiction of the Court of Appeals. Obviously this same consideration could apply to *any* order made by the transferee court during the course of the entire

pretrial proceedings. Surely petitioner does not suggest that every order of the transferee court should be immediately appealable. Under such a rule, parties in multidistrict litigation would be forced to seek protective appeals from nearly every interlocutory order made by a transferee court during the course of the coordinated or consolidated pretrial proceedings to protect themselves from the possibility that such orders may be deemed final and non-appealable at some later time. This result would completely destroy the effectiveness of the Multidistrict Litigation Act.

Petitioner also contends that no effective order can be issued by the Court of Appeals after a trial in which the third-party defendant did not participate in the event the judgment of dismissal by the District Court is held to be in error. However, this situation is no different than that in any other case where a third-party complaint is dismissed and the District Court fails to certify its judgment of the dismissal under Rule 54(b). Furthermore, this contention by petitioner points to what the Court of Appeals said was the most persuasive argument against entertaining the appeal.

It is entirely possible that the District Court's dismissal may be rendered moot by the subsequent course of the litigation. If these cases are settled or if petitioner successfully defends the main litigation, then the effort and delay of an appeal at this time would be rendered fruitless and unnecessary. Because of this possibility, the Court of Appeals intimated that it might have been an abuse of discretion for the District Court to certify its decision for immediate appeal. *E.g., Panichella* v. *Pennsylvania R. R. Co.*, 252 F.2d 452 (3d Cir. 1958); see *Sears, Roebuck & Co.* v. *Mackey*, 351 U.S. 427, 436 (1956).

In effect, petitioner is asking for the right to appeal any order of the transferee court before litigation is remanded to the various transferor jurisdictions, simply to avoid the possibility that the Court of Appeals in more than one Circuit may eventually review the decisions of the transferee court. Such a procedure would impede orderly pretrial proceedings in multidistrict litigation and totally defeat the salutary purpose of the Multidistrict Litigation Act. Rule 54(b) and 28 U.S.C. § 1292(b) provide adequate relief for immediate appeals in multidistrict litigation as in any other cases.

2. The decision of the Court of Appeals for the Seventh Circuit dismissing the appeal is not in conflict with the decision of any other Court of Appeals or any decision of the Judicial Panel on Multidistrict Litigation.

Petitioner argues this Court should grant certiorari based on its assertion that there is a conflict of opinion between the Court of Appeals and the Judicial Panel on Multidistrict Litigation as to the meaning of "pretrial proceedings". (Pet. p. 9-11)

Contrary to petitioner's suggestion, the Court of Appeals never stated it believed it would have jurisdiction to review the instant appeals only if they involved "pretrial proceedings". What the Court of Appeals did say, however, was that pretrial proceedings undertaken in the transferee court and before remand, were subject to early review in the Court of Appeals for the transferee district. The statement was made in answer to petitioner's contention that no effective review of the judgment of dismissal could be obtained after the cases were returned to the transferor districts. The Court of Appeals clearly stated, "that final judgment of all aspects of the case would be effected in the jurisdic-

tion where it is ultimately disposed of irrespective of its interim travels." (Pet. p. 41)

Based on the foregoing portion of the opinion by the Court of Appeals, petitioner states that it now expects "a proliferation of appeals from orders entered by transferee courts in multidistrict litigation proceedings." (Pet. p.11) It is indeed difficult to see how the "inundation of appeals" expected by petitioner could possibly result from an opinion which denied appellate jurisdiction. Had the Court of Appeals granted jurisdiction, then petitioner's expectations would have materialized, because litigants would be denied the degree of certainty concerning finality of a partial judgment now afforded by Rule 54(b).

The decision of the Court of Appeals for the Seventh Circuit is consistent with the decisions of other Courts of Appeal which have refused jurisdiction of an appeal from an order of a District Court dismissing a third-party complaint in the absence of a Rule 54(b) certification. *E.g., Coulter* v. *Sears, Roebuck and Co.*, 411 F.2d 1189 (5th Cir. 1969); *Weinstock Hermanos & Cia Ltda.* v. *American Aniline & E. Co.*, 406 F.2d 1327 (3d Cir. 1969); *Peralta* v. *Quad Tool and Dye Supply Co.*, 370 F.2d 103 (3d Cir. 1966); *Courembis* v. *Independence Avenue Drug Fair, Inc.* 316 F.2d 658 (D. C. Cir. 1963); *Luckenbach Steamship Co.* v. *H. Muehlstein & Co.*, 280 F.2d 755 (2d Cir. 1960).

Each of the foregoing decisions recognizes the applicability of Rule 54(b) to an order dismissing a third-party complaint in any litigation involving multiple claims or multiple parties. The opinion of the Court of Appeals is not in conflict with the decision of any other Court of Appeals and petitioner refers to none.

3. The Multidistrict Litigation Act does not enlarge the jurisdiction of the District Court or the Court of Appeals.

After the various cases involved in this petition were transferred to the Southern District of Indiana for consolidated pretrial proceedings pursuant to 28 U.S.C. § 1407, petitioner filed third-party complaints in those actions seeking to implead respondent as personal representative of the Estate of Robert W. Carey. Respondent moved to dismiss the third-party complaints. The District Court granted the motion to dismiss and by separate entry expressly refused to certify its decision under Rule 54(b) or 28 U.S.C. § 1292(b). In his capacity as personal representative, respondent is a citizen and resident only of the State of Indiana, and as such, is not amenable to service of process in any other state, and is not subject to the jurisdiction of any of the various transferor courts. If the District Court had permitted respondent to be impleaded as a third-party defendant, he would have been forced to stand trial in numerous jurisdictions located in various parts of the country when these cases are all remanded to their respective transferor courts upon the completion of pretrial discovery. Such a ruling would have greatly enlarged the jurisdiction of District Courts in diversity cases. This certainly is not the intent of 28 U.S.C. § 1407.

The legislative history of the Multidistrict Litigation Act found in 1968 U.S. Code Cong. and Adm. News, page 1898, indicates that its purpose is "to provide centralized management under court supervision of pretrial proceedings of multidistrict litigation to assure the 'just and efficient conduct' of such actions." The House Report of the Judiciary Committee further states at page 1900:

> "To accomplish this objective, the bill provides for the transfer of venue of an action for the limited purpose of conducting coordinated pretrial proceedings. The proposed statute affects only the pretrial stages in multidistrict litigation. *It would not affect*

> *the place of trial* in any case or exclude the possibility of transfer under other Federal statutes." (Emphasis added).

There is nothing in the legislative history or the language of the Act itself to indicate the Congress intended to enlarge the jurisdiction of the transferor court or to change the place of trial. However, this apparently is the result urged by petitioner. Once the pretrial proceedings are completed, 28 U.S.C. § 1407(a) requires the Judicial Panel to remand all of the actions to the various District Courts from which they were transferred. If the transferee court permitted respondent to be impleaded, he would be forced to stand trial on the third-party complaints before nine different District Courts located in eight states, in none of which respondent is subject to service of process. It would be an unduly harsh rule that would permit an individual defendant to be impleaded during pretrial proceedings and then, after remand, be forced to stand trial in virtually any District Court in the federal judicial system where a plaintiff may have commenced the action.

The purpose of the Multidistrict Litigation Act is to avoid repetitive pretrial proceedings in multidistrict litigation "for the convenience of parties and witnesses" and to "promote the just and efficient conduct of such actions." 28 U.S.C. § 1407. As noted above, Congress intended that the Act should not affect the place of trial in any case. Adequate provision for the change of venue for the purposes of trial exists under 28 U.S.C. § 1404 and 28 U.S.C. § 1406. The critical distinction between a transfer for consolidated pretrial proceedings under 28 U.S.C. § 1407 and a change of venue under 28 U.S.C. § 1404 or 28 U.S.C. § 1406, is that with a change of venue under the latter two statutes the trial will be held in the transferee jurisdiction.

Thus, a party impleaded after a change of venue under 28 U.S.C. § 1404 or 28 U.S.C. § 1406 could defend the third-party claim against him in a jurisdiction where he was subject to service of process. This is in direct contrast to the result urged by petitioner. It argues a third-party could be impleaded in the jurisdiction of a transferee court after a transfer under 28 U.S.C. § 1407 for consolidated pretrial proceedings and then be forced to defend the third-party claims at trials held in those jurisdictions to which the cases will be remanded after the completion of pretrial proceedings.

The decision of the District Court dismissing the third-party complaints does not restrict the objectives of 28 U.S.C. § 1407 and should not affect the site of the transferee forum selected by the Judicial Panel in future cases. In the instant case there is no indication, as petitioner implies, that the Judicial Panel selected the Southern District of Indiana as the transferee forum to permit residents of that state to be impleaded. To the contrary, the Panel stated:

> "Factors favoring the selection of the Southern District of Indiana include: (1) numerous eye-witnesses to the collision reside in that district, (2) much of the potentially relevant material evidence is located in Indianapolis and (3) the owner of the Piper Cherokee is an Indiana corporation with its principal office in Indianapolis. Perhaps most important is the fact that the crash occurred in the Southern District of Indiana.
>
> We have consistently held that the district encompassing the situs of the crash is generally the most appropriate transferee district for litigation of this type." *In re Mid-Air Collision Near Fairland, Indiana,* 309 F. Supp. 621, 622 (JPML 1970).

Obviously in selecting the situs of each transferee jurisdiction for pretrial proceedings, the Judicial Panel considers foremost the situs where it would be most convenient to conduct discovery proceedings because of the location of witnesses and material evidence. As a result of this factor alone, the situs selected in future multidistrict tort litigation will undoubtedly continue to be the jurisdiction in which the accident occurred. Accordingly, the action of the District Court dismissing petitioner's third-party claims and the refusal by the Court of Appeals to accept jurisdiction of petitioner's appeal from that decision have in no way influenced future proceedings which may be undertaken by the Judicial Panel on Multidistrict Litigation and have not detracted from the purposes of the Multidistrict Litigation Act.

In dismissing the appeal, the Court of Appeals did not receive final briefs on the merits of the District Court's ruling and did not hear oral argument. It decided only the issue of appellate jurisdiction. In the absence of the requisite certification under Rule 54(b) or 28 U.S.C. § 1292(b), the Court of Appeals correctly decided that the District Court's decision was not an appealable final judgment.

Conclusion

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

FLOYD W. BURNS
RICHARD R. MCDOWELL
800 Union Federal Building
Indianapolis, Indiana 46204
Attorneys for Respondent

CADICK, BURNS, DUCK & NEIGHBOURS
800 Union Federal Building
Indianapolis, Indiana 46204
Of Counsel